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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92053066
Party	Defendant Yulong Computer Telecommunication; Scientific (Shenzhen) Co., Ltd
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Submission	Motion to Dismiss - Rule 12(b)
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Attachments	COOLPAD RESPONSE TO MOTION TO STRIKE.pdf (15 pages)(80885 bytes)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In re: Trademark Registration No.: 3527661

Mark: **COOLPAD 酷派**

Registration Date: November 04, 2008

Road Tools LLC)	Cancellation No.: 92053066
)	
Petitioner,)	
)	
vs.)	REGISTRANT'S RESPONSE TO
)	MOTION TO DISMISS
YULONG COMPUTER)	COUNTERCLAIM COUNT TWO
TELECOMMUNICATION; SCIENTIFIC)	AND MOTION TO STRIKE
(SHENZHEN) Co., LTD,)	AFFIRMATIVE DEFENSES
Registrant)	
<hr/>		
AND RELATED CROSS ACTION)	

Registrant, YULONG COMPUTER TELECOMMUNICATION; SCIENTIFIC
(SHENZHEN) Co., LTD, through undersigned counsel, hereby opposes Petitioner's Motion To
Dismiss Counterclaim Count Two and Motion To Strike Affirmative Defenses.

PROCEDURAL POSTURE AND INTRODUCTION

Petitioner Road Tools LLC ("Petitioner" or "Road Tools") has conceded in its Motion (as well as in its Answer to Counterclaim for Cancellation herein) that it had filed this cancellation matter seeking cancellation of the Registrant's Federal Trademark Registration No. 3527661, on at time when the Petitioner had been involuntarily dissolved by the Massachusetts Secretary of State and thus had no Article III standing to bring this action. See: *Paradise Creations Inc. v. UV Sales, Inc.*, 315 F.3d 1304 (U.S.C.A. Fed. Cir. 2003).

Like the Plaintiff-Appellant in the *Paradise Creations* case, the Petitioner herein (on April 30, 2009) had been administratively dissolved by the Secretary of State for failing to file its annual reports, pursuant to Massachusetts State law Statutes, chapter 156C, Section 70 which provides, in part: "(c) A limited liability company administratively dissolved continues in existence, but shall not carry on any business except that necessary to wind up and liquidate its

affairs.” Similarly, the Massachusetts State law is identical to the Florida State law at issue in *Paradise Creations* case because both State laws prohibit dissolved entities from conducting business except that necessary to wind up and liquidate their business and affairs. Also, like the Plaintiff-Appellant in the *Paradise Creations* case, the Petitioner herein had remained administratively dissolved until it obtained reinstatement (apparently on November 12, 2010), after the filing of the complaint in this action.

In *Paradise Creations*, the Court of Appeals for the Federal Circuit upheld the lower court’s decision dismissing the case on the basis that “because the appellant had been administratively dissolved since August 1996, it did not have capacity to sue under Florida law or standing to invoke the district court’s jurisdiction under Article III of the United States Constitution.”

Even after the *Paradise Creations* plaintiff had obtained reinstatement the district court granted the appellee’s motion for summary judgment, holding that standing in federal court is a matter of federal law, and “depends upon the state of things at the time of the action brought.” *Paradise Creations*, No. 00-8898, slip op. at 5 (quoting *Keene Corp. v. United States*, 508 U.S. 200, 207 (1993)). Therefore, the court reasoned, the Florida Corporation Statutes could not retroactively create jurisdiction where it was lacking at the time the action was filed. *Id.* at 7.”

On appeal, the Federal Circuit upheld the lower court’s decision and specifically ruled that a party “must establish standing under Article III of the Constitution at the time it filed suit.” Whether a party has standing to sue in federal court is a question of federal law. *Baker v. Carr*, 369 U.S. 186, 204 (1962). Article III standing, like other bases of jurisdiction, generally must be present at the inception of the lawsuit. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 570 n.5 (1992) (plurality opinion) (“[S]tanding is to be determined as of the commencement of suit.”); see also *Keene Corp. v. United States*, 508 U.S. 200, 207 (1993) (“[T]he jurisdiction of the Court

depends on the state of things at the time of the action brought.”); Arizonans for Official English v. Arizona, 520 U.S. 43, 64, 67 (1997) (holding that standing is an aspect of the case or controversy requirement, which must be satisfied “at all stages of review”).

As noted above, whether a party has standing to assert the jurisdiction of a federal court is a question of federal law, and “standing is to be determined as of the commencement of suit.” Lujan, 504 U.S. at 570 n.5. Thus, like the Plaintiff-Appellant in *Paradise Creations*, Road Tools not only lacked Article 3 standing to assert this action at the time it was filed, it similarly lacked any enforceable right to assert a likelihood of confusion between its prior registered mark and the Registrant’s Trademark Registration No.: 3527661 for the mark **COOLPAD 酷派** at issue herein.

Thus, as the direct result of Road Tools filing this action at time (nearly two years) after it had been administratively dissolved, several unique issues have been presented herein, which themselves give rise to a unique ground for cancellation of Road Tools’ trademark Registration No. 2563728 as well as the unique affirmative defense of trademark misuse, which has been alleged as a grounds for cancellation in the Registrant’s counterclaim, as based on Road Tools’ Petition brought on September 27, 2010 and its assertion of ownership of such trademark registration despite numerous factual errors and omissions in its pleadings and the plain fact that as a dissolved limited liability company, it had no enforceable right to carry on any business except that necessary to wind up and liquidate its affairs.

Rather than simply concede its position, Road Tools has now caused further delay and increased the cost of this matter by filing an unwarranted Motion challenging count two of the Registrant’s counterclaim and several of the affirmative defenses raised by the Registrant in its Answer to Road Tools’ Petition For Cancellation.

I. COUNT TWO OF REGISTRANT’S COUNTERCLAIM FOR CANCELLATION OF REGISTRATION NO. 2563728 IS A VALID AND SUFFICIENT GROUND UNDER THE CIRCUMSTANCES HEREIN

Inasmuch as the Petitioner had been administratively dissolved at the time that it filed this action, Registrant filed a counterclaim for cancellation and raised *inter alia* the following grounds therefor:

“13. Upon information and belief, the mark shown in the ‘728 Registration has not been used by the Petitioner/Counterclaim Defendant since at least as early as April 30, 2009 and is not presently in use by Petitioner/Counterclaim Defendant.

14. To the extent that the COOLPAD mark has been used, in connection with any “computer stands specifically designed for holding a computer,” if any, since May 01, 2009 and continuing through the present, it has been used solely as to misrepresent the source of the goods in connection with which such mark has been used.

15. Further by asserting the ‘728 Registration in this proceeding, (and without first having contacted the Registrant) well over two years after the Registrant had obtained the ‘661 Registration and well over one year after the Petitioner/Counterclaim Defendant had been involuntarily dissolved by the Massachusetts Secretary of the Commonwealth, Petitioner/Counterclaim Defendant has engaged in trademark misuse herein.”

LEGAL STANDARD

Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a “short and plain statement of the claim showing that the pleader is entitled to relief.” To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to “state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, _ U.S. __, 129 S.Ct. 1937, 1949 (2009) quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). “Determining whether a complaint states a plausible claim for relief will ... be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” *Ashcroft v. Iqbal*, at 1950. The Supreme Court has “retired” the pleading standard that “a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Bell Atlantic Corp. v. Twombly* at 562-563 (“The phrase is best forgotten as an incomplete, negative gloss on an

accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint.”). Therefore, in order to withstand a motion to dismiss for failure to state a claim, a plaintiff need only allege such facts as would, if proved, establish that (1) the plaintiff has standing to maintain the proceedings, and (2) a valid ground exists for opposing the mark. The pleading must be examined in its entirety, construing the allegations therein liberally, as required by Fed. R. Civ. P. 8(f), to determine whether it contains any allegations which, if proved, would entitle plaintiff to the relief, sought. *See Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185 (CCPA 1982); *Kelly Services Inc. v. Greene's Temporaries Inc.*, 25 USPQ2d 1460 (TTAB 1992); and TBMP § 503.02 (2d. ed. rev. 2004).

For purposes of determining a motion to dismiss for failure to state a claim upon which relief can be granted, all of plaintiff's well-pleaded allegations must be accepted as true, and the complaint must be construed in the light most favorable to plaintiff. *See Advanced Cardiovascular Systems Inc. v. SciMed Life Systems Inc.*, 988 F.2d 1157, 26 USPQ2d 1038 (Fed. Cir. 1993); *see also* 5A Wright & Miller, *Federal Practice And Procedure: Civil 2d* § 1357 (1990). Dismissal for insufficiency is appropriate only if it appears certain that opposer is entitled to no relief under any set of facts which could be proved in support of its claim. *See Stanspec Co. v. American Chain & Cable Company, Inc.*, 531 F.2d 563, 189 USPQ 420 (CCPA 1976).

In evaluating the sufficiency of a pleading, Trademark Rule 2.104(a) provides that: The opposition must set forth a short and plain statement showing why the opposer believes he, she or it would be damaged by the registration of the opposed mark and state the grounds for opposition. The elements of each claim should be stated concisely and directly, and include enough detail to give the defendant fair notice. *See* Fed. R. Civ. P. 8(e)(1); *see also Harsco*

Corp. v. Electrical Sciences Inc., 9 USPQ2d 1570, 1571 (since function of pleadings is to give fair notice of claim, a party is allowed reasonable latitude in its statement of its claims). Under the simplified notice pleading of the Federal Rules of Civil Procedure, the allegations of a complaint should be construed liberally.

In this case, Registrant has specifically alleged that while dissolved and legally unable to conduct any business other than the winding up and liquidating of its affairs, Road Tools, apparently knowingly and willfully asserted a Federal Trademark Registration (the ‘728 Registration) in an attempt to deceive or mislead consumers or others in the trade (including Registrant) into believing that the mark was validly registered to it, although the mark shown in the ‘728 Registration could not legally be used in commerce by Petitioner (as such entity was no longer in existence); and that such mark was not then in use and had not been used by Road Tools since at least as early as April 30, 2009. Further, Registrant alleged that to the extent that the COOLPAD mark has been used, in connection with any “computer stands specifically designed for holding a computer,” if any, since May 01, 2009, and continuing through the present, it has been used solely as to misrepresent the source of the goods in connection with which such mark has been used. Therefore, it was properly alleged that by asserting the ‘728 Registration in this proceeding, well over two years after the Registrant had obtained the subject ‘661 Registration and well over one year after the Petitioner/Counterclaim Defendant had been involuntarily dissolved by the Massachusetts Secretary of the Commonwealth, Petitioner/Counterclaim Defendant has engaged in trademark misuse herein.

Thus although Petitioner’s counsel has argued in his Motion that “Trademark misuse is not an independent cause of action, but is, instead only an affirmative defense to a trademark infringement claim,” he overlooks the important distinction between Federal Court infringement actions and TTAB opposition and cancellation proceedings. Indeed, the Federal Circuit has held:

“The improper use of a registration notice in connection with an unregistered mark, if done with intent to deceive the purchasing public or others in the trade into believing that the mark is registered, is a ground for denying the registration of an otherwise registrable mark.” *Copelands’ Enterprises Inc. v. CNV Inc.*, 20 USPQ2d 1295, 1298 (Fed. Cir. 1991). Therefore, trademark misuse is certainly a ground for opposition in TTAB matters.

Presumably, the same or similar fraudulent conduct would sustain a petition to cancel as well, especially in the circumstances presented here, where a defunct company sees an opportunity to exploit its abandoned mark well after it has been legally dissolved, and thusly brings a TTAB cancellation action attacking a mark that it could have opposed years ago when it was still in existence.

Moreover, the Board has indeed recognized approvingly a cause of action for trademark misuse, in the matter of: *North Atlantic Operating Co., Inc. et al v. DRL Enterprises, Inc.* Opposition No. 91158276), in which it denied a motion to dismiss as based on the legal sufficiency in the claims brought therein. As such, Petitioner’s Motion To Dismiss the Second ground for cancellation (trademark misuse) must be denied.

II. REGISTRANT’S FIRST, THIRD, FOURTH, FIFTH, SIXTH, SEVENTH, EIGHTH NINTH, TENTH, ELEVENTH AND TWELFTH AFFIRMATIVE DEFENSES ARE PROPER AND SHOULD NOT BE STRICKEN

As grounds for its Motion To Strike Registrant’s Affirmative Defenses, Road Tools argues that “[t]he fact that for a period of time Road Tools LLC was listed as being administratively in arrears for failing to timely file its annual reports and dues with the Massachusetts Commonwealth, such that it resulted in an involuntary status of “administratively dissolved” does not prevent the legal entity from existing or asserting its trademark rights in a court of law or this administrative proceeding. The fact is the administrative technicality has been corrected and the Petitioner is no longer listed as administratively dissolved.”

Road Tools is wrong.

In *Paradise Creations*, the Court specifically noted the case of Stock Pot Restaurant, Inc. v. Stockpot, Inc., 737 F.2d 1576, 222 USPQ 665 (Fed. Cir. 1984), where, similar to Road Tools, the appellee was a dissolved Massachusetts corporation at the time it filed suit and therefore did not have capacity to sue under Massachusetts law. 737 F.2d at 1580, 222 USPQ at 668. Like Road Tools, during the course of proceedings, the appellee obtained reinstatement and, pursuant to a Massachusetts corporate revival suit, reobtained capacity to sue. Id. However, the *Paradise Creations* court noted that the *Stock Pot* court “did not consider whether the appellee lacked Article III standing due to its lack of capacity to sue when the suit was brought.” As such, the *Paradise Creations* court made it clear that in this case, where the issue of standing is properly raised at the outset, that the dissolved entity would be found to lack any Article 3 standing to bring its own claims and thus, herein there are several unique and related issues (as to “use in commerce,” standing and the effect of reinstatement of a formerly dissolved entity that must be considered).

To the extent that Road Tools’ counsel has further alleged “the remaining affirmative defenses all fail to meet the requirements of a properly pled Affirmative Defense, Registrant hereby responds by addressing the respective defenses below and also by requesting that should the Board find that any of Registrant’s defenses have not been sufficiently pleaded, that the Board allow Registrant to amend its answer accordingly.

LEGAL STANDARD

Motions to strike are not favored, and matter will not be stricken unless it clearly has no bearing upon the issues in the case. *See, e.g., Ohio State University v. Ohio University*, 51 USPQ2d 1289, 1293 (TTAB 1999); and *Harsco Corp. v. Electrical Sciences Inc.*, 9 USPQ2d 1570 (TTAB 1988). Inasmuch as the primary purpose of pleadings under the Federal Rules of

Civil Procedure is to give fair notice of the claims or defenses asserted, the Board may decline to strike even objectionable pleadings where their inclusion will not prejudice the adverse party, but rather will provide fuller notice of the basis for a claim or defense. *See, e.g., Order of Sons of Italy in America v. Profumi Fratelli Nostra AG*, 36 USPQ2d 1221, 1223 (TTAB 1995) (amplification of applicant's denial of opposer's claims not stricken). Further, a defense will not be stricken as insufficient if the insufficiency is not clearly apparent, or if it raises factual issues that should be determined on the merits. *See, generally, Wright & Miller*, 5C Fed. Prac. & Proc. Civ.3d § 1381 (2008).

As stated in the TBMP Section 311.02(d): "An answer may include affirmative assertions that, although they may not rise to the level of an affirmative defense, nevertheless state the reasons for, and thus amplify, the defendant's denial of one or more of the allegations in the complaint. These amplifications of denials, whether referred to as "affirmative defenses," "avoidances," "affirmative pleadings," or "arguments," are permitted by the Board because they serve to give the plaintiff fuller notice of the position which the defendant plans to take in defense of its right to registration. *See Humana Inc. v. Humanomics Inc.*, 3 USPQ2d 1696, 1697 n.5 (TTAB 1987) (allegations under heading "affirmative defenses" were in the nature of arguments in support of denial of claim rather than true affirmative defenses and were treated as such); *Maytag Co. v. Luskin's, Inc.*, 228 USPQ 747, 747 n.3 (TTAB 1986) (same); *Textron, Inc. v. Gillette Co.*, 180 USPQ 152, 153 (TTAB 1973) (objection to certain paragraphs of answer as verbose and argumentative not well taken); and *McCormick & Co. v. Hygrade Food Products Corp.*, 124 USPQ 16, 17 (TTAB 1959) (allegation that registered mark is weak does not constitute a collateral attack on validity of opposer's registrations).

ARGUMENT

Registrant's First Affirmative Defense – (failure to state a claim upon which relief can be granted).

Fed. R. Civ. P. 12(b) explicitly permits a defendant to assert in the answer the "defense" of failure to state a claim upon which relief can be granted. Moreover, Registrant's First Affirmative Defense is based, in part upon the fact that the Petitioner lacked Article 3 standing to bring this action and thusly is a valid affirmative defense. In other words, in order for the Board to determine whether to strike Registrant's assertion that Petitioner's pleading fails to state a claim upon which relief can be granted, it is necessary to look at the sufficiency of the original (verbose and meandering) Petition for cancellation. In order to withstand the assertion that a pleading fails to state a claim, a plaintiff need only allege such facts that would, if proved, establish that (1) the plaintiff has standing to maintain the proceeding, and (2) a valid ground exists for opposing the mark. However, because Road Tools is asserted to have lacked standing to bring the action and also had apparently abandoned the mark and thusly lacked a valid basis for seeking to cancel the Registrant's Registration, the original Petition fails to state a claim upon which relief can be granted herein. (*See: Paradise Creations infra*). As such, Registrant should have every right to defend on this basis under the circumstances herein and certainly intends to move the Board to dismiss the original Petition on such basis.

Registrant's Third Affirmative Defense – (Petitioner has abandoned any and all alleged common law rights and any and all rights in Registration No. 2,563,728 without any intent to resume such use.) This affirmative defense which involves an absence of proprietary rights in an alleged mark, provides Petitioner with notice of Registrant's position with respect to Road Tools' claim of priority and, thus, primarily functions to amplify applicant's denial of Registrant's claim of likelihood of confusion and does not prejudice Petitioner in any manner. As such, Registrant's third affirmative defense should not be stricken.

Registrant's Fourth Affirmative Defense – (Road Tools does not own any trademark rights in the marks asserted). This affirmative defense which involves an absence of proprietary rights in an alleged mark, provides Petitioner with notice of Registrant's position with respect to Road Tools' claim of priority and, thus, primarily functions to amplify applicant's denial of Registrant's claim of likelihood of confusion and does not prejudice Petitioner in any manner. As such, Registrant's fourth affirmative defense should not be stricken.

Registrant's Fifth, Sixth, and Seventh Affirmative Defenses – (Laches, Estoppel & Acquiescence)

TBMP Section 311.02(b) provides in relevant part: "An answer may contain any defense, including the affirmative defenses of unclean hands, laches, estoppel, acquiescence, fraud, mistake, prior judgment, or any other matter constituting an avoidance or affirmative defense."

In this case, it has been specifically alleged that the Petitioner Road Tools, LLC failed to comply with Massachusetts State law and allowed itself to become involuntarily dissolved and lack any entity status and that it was further barred from conducting any business other than the winding up and liquidating of its affairs.

It has also been alleged and cannot be disputed that: (a) the Registrant's mark **Coolpad 酷派**, was published for opposition on August 19, 2008; (b) that no opposition against such mark was filed by anyone, including Road Tools, LLC; and (c) that Registration No.: 3,527,661 for such mark issued on November 04, 2008. Moreover, Registration No.: 3,527,661 has subsisted on the Principal Register without any instances of any actual confusion and no correspondence, threat, or inquiry had ever been made between such parties. Indeed, no apparent contact had existed between these parties prior to the Petitioner filing the instant action. All the while, Registrant used and invested in its mark internationally and made significant efforts, including substantial investments of time and money spent towards using its own REGISTERED

mark in the United States. As such, Registrant has raised the respective defenses of Laches, Estoppel and Acquiescence, because these defenses, in Board proceedings, start to run from the time of knowledge of the application for registration (that is, from the time the mark is published for opposition), not from the time of knowledge of use. See *National Cable Television Association v. American Cinema Editors Inc.*, 937 F.2d 1572, 19 USPQ2d 1424, 1432 (Fed. Cir. 1991); *Coach House Restaurant Inc. v. Coach and Six Restaurants Inc.*, 934 F.2d 1551, 19 USPQ2d 1401, 1404-05 (11th Cir. 1991); and *Turner v. Hops Grill & Bar Inc.*, 52 USPQ2d 1310, 1312 (TTAB 1999). *Aquion Partners L.P. v. Envirogard Ltd.*, 43 USPQ2d 1371, 1373 (TTAB 1991) (laches defense in an opposition may be based on opposer's failure to object to an earlier expired registration of substantially the same mark for substantially the same goods).

And because the Registrant has been prejudiced **not only** by the Petitioner's delay in opposing the mark, sending any correspondence regarding its alleged position or even filing the cancellation matter in a timely fashion. Instead, the Petitioner allowed itself to become involuntarily dissolved on the records of the Massachusetts entity database for nearly two years, during which time, the Registrant reasonably believed that Road Tools had ceased in its business, if any; had acquiesced and agreed to the Registrant's use of its own mark and/or that Road Tools had been legally precluded from using its own COOLPAD mark and/or otherwise challenging the Registrant's use of its own **COOLPAD 酷派** mark.

Irrespectively, and because the parties' respective marks and the parties goods are each sufficiently distinct, and due to the acts and omissions of the Petitioner, the Registrant reasonably believed that Road Tools would not challenge the Registrant's use of its mark in the United States nor the subject **COOLPAD 酷派** registration duly issued in 2008.

As such, it would be unfair and unreasonable to permit the Petitioner to seek to cancel the Registrant's mark under such circumstances. For such reason, the Motion to Strike should be denied.

Registrant's Eighth Affirmative Defense – (Petitioner's alleged use of the mark is not in the ordinary course of trade and is not "use in commerce" sufficient to be cognizable use supporting rights of the Petitioner under the Lanham Act or otherwise.). This affirmative defense which involves an absence of proprietary rights in an alleged mark, provides Petitioner with notice of Registrant's position with respect to Road Tools' claim of priority and, thus, primarily functions to amplify applicant's denial of Registrant's claim of likelihood of confusion and does not prejudice Petitioner in any manner. As such, Registrant's eighth affirmative defense should not be stricken.

Registrant's Ninth Affirmative Defense – (Unclean Hands)

a. Duffy-Mott Co. v. Cumberland Packing Co. 424 F.2d 1095, 1009-160, 165 USPQ 422, 425 (CCPA 1970) and its progeny have favorably permitted the affirmative defense of unclean hands as based on the conduct as is alleged in the Counterclaim herein and thus, such affirmative defense should not be stricken. Indeed to the extent (as discovery herein will likely determine) that Road Tools abandoned the mark, failed to use its mark or otherwise made false allegations in the Petition herein, the Registrant must be permitted to maintain such affirmative defense. (see e.g., *Toro Co. V. Grassmasters, Inc.* 66 USPQ2d 1032, 1038 (TTAB 2003); *Lever Bros. Co. v. Shaklee Corp.*, 214 USPQ 654, 659-660 (TTAB 1982); *VIP Foods, Inc. v. VIP Food Products*, 200 USPQ 105, (TTAB 1978) ; *Stardust, Inc. v. Birdsboro Knitting Mills, Inc.* 119 USPQ 270, 271 n5).

b) Registrant has also raised "unclean hands" as an affirmative defense herein on alternative grounds, namely that of Road Tools' misuse of Trademark Registration No.

2,563,728 and/or misuse of the COOLPAD mark associated therewith. As such, and because discovery herein will elucidate such permissible and valid equitable legal issues, the Board should not grant the Motion To Strike Registrant's Ninth Affirmative Defense.

Registrant's Eleventh Affirmative Defense – (Road Tools' claims are barred because the Petitioner has engaged in trademark misuse, and the Petitioner's claimed registration is being used by, or with the permission of, the Petitioner so as to misrepresent the source of the goods or services on or in connection with which the mark is used).

At page 4 of its Motion Road Tools asserts that "Trademark misuse is not an independent cause of action, but is, instead only an affirmative defense to a trademark infringement claim." However, noting that the doctrine of trademark misuse has been applied by civil courts in infringement matters, its counsel still persists in seeking to strike such valid and proper affirmative defense that was well and sufficiently pleaded in the Registrant's Answer and Counterclaim.

Inasmuch as the Petitioner had clearly and undisputedly been administratively dissolved for a period of time from April 2009 through and including the date that it brought this cancellation proceeding, and through November 12, 2010, and because under Massachusetts law, such dissolved entity had no right to use the COOLPAD mark or to otherwise engage in any business other than the winding up and liquidating of its affairs, the Registrant has alleged that any use of the mark during such time, (by anyone); any reliance upon the cited '728 Registration by the dissolved entity; and the bringing of this action itself each constitute acts of trademark misuse. As such, the Eleventh Affirmative Defense is properly pled and should not be stricken.

CONCLUSION

For the foregoing reasons, the Board should deny the Petitioner's Motion. In the event that the Board should grant any part of the Motion To Dismiss or Motion To Strike, Registrant requests an opportunity to amend its pleadings accordingly.

Respectfully submitted,

ANDERSON & ASSOCIATES

Dated: January 11, 2011

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Certificate of Service

I hereby certify that on the date set forth below, a true copy of the foregoing
**REGISTRANT'S RESPONSE TO MOTION TO DISMISS COUNTERCLAIM COUNT
TWO AND MOTION TO STRIKE AFFIRMATIVE DEFENSES**
was mailed first-class mail, postage prepaid, to
JEFFREY H. GREGER
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Dated: January 11, 2011

Stephen L. Anderson